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ORDER, DECISION, OR AWARD OF THE LABOR COMMISSIONER

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2. Claiming waiting time penalties pursuant to Labor Code Section 203.

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1. The Plaintiff was formerly employed by the Defendant to perform personal services, as a Sales Representative, for the period 8/1/99 to 11/16/01, in the County of Kern, California, under the terms of an oral agreement, at the promised rate of compensation of \$5,000.00 per month (commissions & draw).
2. Plaintiff provided Defendant, on 11/5/01, a two week notice of his intention to quit on 11/16/01. Plaintiff received his final uncontested wages on 11/19/01.

- 1 3. Plaintiff testified, that during his employment, the Defendant's verbal vacation policy
2 provided for two weeks of vacation after two years of employment. Plaintiff testified
3 he did not take vacation during his employment with Defendant. Plaintiff seeks to
4 recover \$2,500.00 in unpaid vacation earned during the period 8/1/99 to 11/16/01.
- 5 4. Plaintiff testified that when hired, he was told by the Defendant that he would receive
6 a two week paid vacation after two years of employment. Plaintiff stated, typically, an
7 employee could take time off (vacation, sick, etc) and continued to receive
8 commissions and wages, as long as that employee's sales territory was covered by
9 another sales representative. Plaintiff stated, during his employment he was absent
10 from work due to family illness and to attend his son's wedding. Plaintiff related,
11 during this time, a co-worker covered his territory and he continued to receive wages
12 & commissions on designated paydays.
- 13 5. Lastly, Plaintiff claims waiting time penalties pursuant to Labor Code Section 203 at
14 his daily rate of \$186.80 as the wages claimed herein have not been paid.
- 15 6. Defendant disputes the Plaintiff's claim in its entirety and asserts there is no and there
16 has never been a vacation policy at the business. Defendant Elbert related that the
17 business has a "time-off" policy which provides that an employee can take time off for
18 whatever reason/purpose when requested, provided that employee's sales territory is
19 covered by another sales representative. Elbert stated that the absent employee
20 continues to receive earned commissions/wages based upon continued coverage of
21 that employee's territory by a co-worker (s). Elbert related that if an employee has a
22 large territory, that employee's territory is divided between 2 to 3 other sales
23 representatives so as not to overburden one employee. Elbert stated that the
24 businesses time off policy, insures that employee's continue to receive compensation,
25 even during absences. Elbert stated that the Plaintiff had, previously utilized the time
26 off policy for families illnesses, personal reasons and to attend his sons wedding.
27 Plaintiff also regularly took time off on Thursdays and Fridays, for commuting

1 purposes when he resided in Sacramento, California in 1999 & 2000. Elbert testified
2 that commissions are earned by employees at the time the sale is made. Elbert
3 confirmed the Plaintiff provided advance notice of his intention to quit on 11/16/01
4 and he was paid his final wages on 11/19/01.

5 LEGAL ANALYSIS

- 6 1. The Plaintiff, as the party asserting the affirmative, has the burden of proof including
7 the initial burden of going forward and the burden of persuasion by a preponderance
8 of the evidence. No evidence of sufficient substantiality was presented to support a
9 decision in favor of the Plaintiff. Plaintiff failed to prove that the Defendant
10 maintained a vacation policy during his employment. Defendant's "time off" policy
11 cannot be construed as a vacation policy inasmuch as there is no additional program
12 established which provides for compensation above and beyond regular
13 commissions/wages earned even during absences. Accordingly, Plaintiff's claim for
14 unpaid vacation wages is dismissed in its entirety.
- 15 2. Labor Code Section 202 provides in relevant part, that if an employee quits their
16 employment, all earned wages shall become due and payable not later than 72 hours
17 thereafter, unless the employee has given 72 hours previous notice of his intention to
18 quit, in which case the employee is entitled to his wages at the time of quitting.
- 19 3. Labor Code Section 203 provides that if an employer "willfully" fails to pay in
20 accordance with Section 202 any earned wages of an employee who quits, the wages of
21 such employee shall continue as a penalty from the due date thereof at the same rate
22 until paid, up to 30 days.
- 23 4. A willful failure to pay wages within the meaning of Labor Code Section 203 occurs
24 when an employer intentionally fails to pay wages to an employee when those wages
25 are due.
- 26 5. In the instant matter, Plaintiff provided a two week advance notice of his intention to
27 quit on 11/16/01, which mandated payment of Plaintiff's final wages on 11/16/01.

1 The evidence established and the parties did not dispute, the Plaintiff was paid his full
2 and final wages on 11/19/01, some three days later. Accordingly, Plaintiff is entitled
3 to recover three days waiting time penalties calculated at his corrected daily rate of
4 \$230.76. [\$5,000.00 per month X 12 months, then divided by 52 weeks, then divided by
5 5 days per week}]

6 CONCLUSION

7 For all of the reasons set forth above, IT IS HEREBY ORDERED that:

- 8 1. The Plaintiff is to receive \$692.30 in waiting time penalties pursuant to Labor
9 Code Section 203.

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11 Dated: July 16, 2002

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13 Carmen Alderete, Hearing Officer